STATE OF MICHIGAN

IN THE SUPREME COURT

CHERYCE GREEN, as Personal Representative of the Estate of **KEIMER EASLEY**, deceased

Plaintiff-Appellee,

v.

A.P. PRODUCTS LIMITED, and REVLON CONSUMERS PRODUCTS CORPORATION,

Defendants,

SUPER 7 BEAUTY SUPPLY, INC.,

Defendant-Appellee.

Supreme Court No.: 127734
COA No: 249113
LC No.: 01-125094 NP

ORIGINAL

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PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED *****

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COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Did the Court of Appeals Properly Reverse the Trial Court's Order granting Defendants' Motions for Summary Disposition pursuant to **MCR 2.116(C)(10)**?

Plaintiff-Appellee's Answer.....**Yes**

Defendants-Appellants' Answer .....**No**

Court of Appeals' Answer .....**Yes**

II. Did The Court of Appeals' Use the Proper Standard to Find That The Defendant-Appellant's Duty to Warn Was Not Obviated by The Open And Obvious Defense?

Plaintiff-Appellee's Answer.....**Yes**

Defendants-Appellants' Answer .....**No**

Court of Appeals' Answer .....**Yes**

III. Was The Hair Care Product at Issue a "Simple Product" Under Michigan Law?

Plaintiff-Appellee's Answer.....**No**

Defendants-Appellants' Answer .....**Yes**

Court of Appeals' Answer .....**No**

IV. Was The Mother of Plaintiff's Decedent a Sophisticated User of The Product At Issue?

Plaintiff-Appellee's Answer.....**No**

Defendants-Appellants' Answer .....**Yes**

Court of Appeals' Answer .....**No**

V. Was Ingestion/Aspiration of the Product a Foreseeable Misuse of the Product?

Plaintiff-Appellee's Answer.....**Yes**

Defendants-Appellants' Answer .....**No**

Court of Appeals' Answer .....**Yes**

VI. Did Plaintiff Present Sufficient Evidence to Establish a Question of Fact as to Whether There was a Breach of Implied Warranty?

Plaintiff-Appellee's Answer.....**Yes**

Defendants-Appellants' Answer .....**No**

Court of Appeals' Answer .....**Yes**

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STATEMENT OF BASIS OF JURISDICTION

This Honorable Court has jurisdiction over this matter pursuant to **MCR 7.301(2)** and the October 19, 2005, Order of this Court granting Defendant-Appellant's timely Application for Leave to Appeal from the Court of Appeals decision in **Green v A.P. Products, 264 Mich App 391; 691 NW2d 38 (2005). (Appendix p. 1b-2b).**

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STATEMENT OF FACTS

This is a wrongful death/product liability action arising out of the death of 11 month old Keimer Easley. On or about June 28, 1999, minor Keimer Easley ingested a significant amount of Ginseng Miracle Wonder 8 Oil, Hair and Body Mist-Captive, which was manufactured, distributed, and sold by the Defendants. (**Appendix pp. 4b, 5b, ¶¶ 3, 4, 13**). The hair and body oil did not have a child safety cap and contained no warnings of the products toxicity and that the product contained hydorcarbons, which if ingested can be fatal. (**Appendix pp 4b-5b, ¶¶ 9-12**). In fact, the product label suggested that the product contained natural oils including: Gin Gro Oil complex (Paraffin Oil, Tea Tree Oil, Kuki Nut Oil, Evening Primrose Oil, Avocado Oil, Coconut Oil, Wheat Germ Oil, Isoproply Myristate, Fragrance, Gin Gro Herbal Complex (Mi-Tieh-Hsng (Rosemary), Shu-Wei-Tsao (Sage), Bai-Zhi (Angelica Root), Gan-Cao (Licorice Root), I-Ye-Jen (Job's Tears), Cedar, Hyacincth, Clove, Lemon Balm, Chamomile, Carrot Oleo Resin, Azulene, Tocopheryl Acetate (Vitamin E), Retinyl Palmitate (Vitamin A), Cholecalciferol (Vitamin D). (**Appendix p. 12b**).

After ingesting the hair and body oil, Keimer Easley immediately began experiencing signs of respiratory problems in the form of coughing and gagging. (**Appendix p. 5b, ¶ 15**). As a result, he was immediately transported to Children's Hospital of Michigan, where he was diagnosed with respiratory insufficiency due to aspiration pneumonitis of hydrocarbons. (**Appendix p. 5b, ¶¶ 16-18**). Despite treatment, Keimer Easley's condition deteriorated and he expired on July 30, 1999. (**Appendix p. 5b ¶ 19**). The cause of Keimer Easley's death was identified as multi system organ failure due to chemical pneumonitis caused by hydrocarbon ingestion. (**Appendix p. 6b ¶ 20**).

A wrongful death\product liability claim was filed in this matter alleging that the Defendant, Manufacturers and Distributers A.P. Products and Revlon Consumers Products, and the sellers,

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Defendant, Super 7 Beauty Supply, Inc. failed to properly warn of the products hazardous condition, failed to have an appropriate child proof cap, failed to produce a product safe for its use or foreseeable misuse, and breached implied warranties. (**Appendix pp. 3b-11b**). Defendants filed a Motion for Summary Disposition pursuant to **MCR 2.116(C)(10)**, asserting that Plaintiff could not establish causation in this matter and that no warranty existed in this case. Plaintiff opposed the Defendants' motions. Following a hearing on May 21, 2003, (**Appendix pp. 15a-35a**) Wayne County Circuit Court Judge, Honorable Kaye Tertzag, granted Defendants Motions for Summary Disposition. (**Appendix pp. 37a-38a**).

Plaintiff appealed by right the Trial Court's decision granting Defendants-Appellants' Motion for Summary Disposition to the Michigan Court of Appeals. Subsequently, following full briefing of the issues and oral argument, the Michigan Court of Appeals issued its Opinion on November 23, 2004, reversing the Trial Court's decision and reinstating Plaintiff-Appellee's Complaint. **Green v A.P. Products, 264 Mich App 391; 691 NW2d 38 (2005)**.

Defendants-Appellants sought Leave from the Court of Appeals' decision in **Green, Id. supra**, asserting that the Court of Appeals' decision is essentially contrary to existing Michigan Law. This Honorable Court granted Defendant-Appellant's Application for Leave to Appeal and ordered the parties to brief the following issues: "**(1) whether the Court of Appeals erred in using a subjective rather than objective standard in its analysis of the open and obvious doctrine, (2) whether the Court of Appeals erred in concluding that the product at issue was not a 'simple product', (3) whether the Court of Appeals erred in failing to recognize plaintiff as a sophisticated user as defined by MCL 600.2945(j), and (4) whether aspiration of this product**

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is a foreseeable misuse, and whether the material risk of the misuse is or should be obvious to a reasonably prudent product user." (Appendix pp 1b-2b).

STANDARD OF REVIEW

This Court reviews de novo a Trial Court's decision to grant or deny a Motion for Summary Disposition. **Beaudrie v Henderson, 465 Mich 124, 129; 631 NW2d 308 (2001).** In reviewing a Trial Court's decision regarding a Motion for Summary Disposition pursuant to **MCR 2.116(C)(10),** the Court must consider the entire record including the pleadings, affidavits, depositions, admissions and other documentary evidence. **See Fitch v State Farms, 211 Mich App 468, 470; 536 NW2d 273 (1995); Patterson v Kleiman, 447 Mich 429, 434; 526 NW2d 879 (1994), lv den, 448 Mich 1202 (1995).** Before summary disposition may be granted on grounds that no genuine issue as to any material facts exist, the Trial Court must be satisfied that it is impossible for the claim asserted to be supported by evidence at trial. **See Meridian Mut. Ins. Co. v Hunt, 168 Mich App 672; 425 NW2d 111 (1988).** Specifically, under Michigan law, causation is a question of fact for the jury to decide except in cases where reasonable minds could not reach a different conclusion. **Brisboy v Fibreboard Corp., 429 Mich 540, 418 NW2d 650 (1988) (emphasis added).** Issues involving questions of statutory construction are questions of law, which are also reviewed **de novo**. **Michigan Basic Property Ins. Ass'n v Ware 230 Mich App 44, 48; 583 NW2d 240 (1998);Daniels v Estate of Ware NW2d 32 (1999).**

ARGUMENT

I. The Court of Appeals Properly Reversed the Trial Court's Order Granting Defendants' Motions for Summary Disposition Pursuant to MCR 2.116(C)(10).

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A product liability action is "an action based on a legal or equitable theory of liability brought for the death of a person or for injury to a person or damage to property caused by or resulting from the production of a product." **MCL 600.2945(h); MSA 27A.2945(h).** Production of a product is statutorily defined to include warnings, packaging or labeling. **MCL 600.2945(I); MSA 27A.2945.** A non-manufacturing seller is only liable if they were negligent or breached an express or implied warranty. **MCL 600.2947(6); MSA 27A.2947(6).**

A. The Court of Appeals' Used the Proper Standard to Find That The Defendant-Appellant's Duty to Warn Was Not Obviated by The Open And Obvious Defense

Under Michigan law, a manufacturer or seller of a product has a duty to warn purchasers or users of dangers associated with the intended use or reasonably foreseeable misuse of a product. **Glittenberg v Doughboy Recreational Industries, 441 Mich 379; 491 NW2d 208 (1992).** A seller or manufactures, however, has no duty to warn of open and obvious dangers. **Id. See also MCL 600.2948(2); MSA 27A.2948(2), Fischer v Johnson Milk Co., 383 Mich 158; 174 NW2d 752 (1970); Mack v General Motors Corp., 112 Mich App 158; 315 NW2d 561 (1982).**

The determination as to what is open and obvious is made on an objective basis and is not based on the Plaintiff's subjective knowledge. **Glittenberg, supra at 391-93.** Open and obvious dangers are conditions that create a risk of harm that "is visible, . . . is a well known danger, or . . . is discernable by casual inspection. Thus, one can not say that he did not know of a dangerous condition that was so obvious that it was apparent to those of ordinary intelligence." **Id. at 392 (citing 3 American Law Products Liability, 3d § 33.26 p. 56.)** When a Defendant raises open and obvious as a defense against a failure to warn claim "[t]he court must determine whether reasonable minds could differ with respect to whether the danger is open and obvious. . . . . If the Court

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determines that reasonable minds could differ, the obviousness of the risk must be determined by the Jury. **Glittenberg, supra at 398-99.**

Contrary to the Defendant-Appellant's assertion, the language of the Court of Appeals opinion in **Green** belies any suggestion that the Court of Appeals used a subjective standard. In the case at bar, the Court of Appeals held that

> [t]he risk of possibly becoming ill from the ingestion of the hair and body care product would probably be obvious to a **reasonably prudent product user** and would likely be a matter of **common knowledge to persons n the same or similar position as plaintiff**. We can not conclude, however, that as a matter of law, the risk of death from the ingestion of Wonder 8 Oil **would be obvious to a reasonably prudent product user and be a matter of common knowledge**, especially considering the lack of any relevant warning. . . . Indeed, the reference to natural oils, such as coconut and wheat germ oil, as listed on the bottle of Wonder 8 Oil, could lead a reasonable person to conclude that there was little chance, if any, that ingestion would lead to serious ill effects, let alone death. . . .Even if a reasonable person would be conscious of possible harm or of a vague danger associated with the product, it does not "preclude a jury from finding that a warning was nonetheless required to give [the purchaser] a full appreciation of the seriousness of the life-threatening risks involved. **Green, supra at 401-402.**

The Court of Appeals not only utilized the objective "reasonably prudent person" standard to reach it's decision, but ruled in a manner, which was consistent with existing case law in interpreting the "open and obvious" standard and how it was to be applied.

In **Hollister v Dayton Hudson Corporation, 201 F3d 731 (2000)**, the Sixth Circuit Court of Appeals, applying Michigan Law, found that summary disposition was inappropriate because reasonable minds could differ as to the obviousness of the risk posed by the product. **Id. at 741**. In **Hollister**, Plaintiff was injured when a shirt manufactured and sold by the Defendant caught fire. The Court found that although a reasonable person might be expected to know that clothing is flammable, an ordinary consumer would have had no way of knowing that a particular shirt was

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substantially more combustible. As such, the issue was one for the Jury to decide and summary disposition was improper. **Id.**

Similarly, in **Michigan Mutual Insurance Company v Heatilator Fireplace, 422 Mich 148: 366 NW2d 202 (1985)** this Court held that as a matter of law, the risk of causing a fire posed by a product user obstructing a fireplace's heat vent was not open and obvious. **Id. at 153**. While the Court found that it was undisputed that the Plaintiff knew the vents should not be blocked, there was testimony that the Plaintiff believed the obstruction would limit the airflow necessary for the fireplace to serve its room-heating purpose. **Id.** The Court went on to state that "[e]ven if it is arguable that [plaintiff's] testimony established consciousness on his part of a vague danger, it would not preclude a jury from finding that a warning was nonethelsss required to give him a full appreciation of the seriousness of the life-threatening risks involved." **Id. at 154**

In the case at bar, the Court of Appeals properly held that reasonable minds could differ as to whether the danger posed by the Wonder 8 Oil, death from ingestion of hydrocarbons contained in the product, was open and obvious to a reasonably prudent product user. As in **Hollister** and **Michigan Mutual**, while this is not a product that one would want their child to drink or even taste due to a vague risk of injury in the form of nausea, vomiting, or stomach upset, the products extreme toxicity and fatal consequences if ingested would not be considered or understood by the average purchaser of the product. This is especially true where the label does not identify the presence of

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hydrocarbons in the product and the product label provides a "recipe" of all natural ingredients.[1] **(Appendix p 12b).**

Thus, it is clear that the Court of Appeals utilized the objective "reasonably prudent person" standard and found that reasonable minds could differ as to whether the risk of death posed by the hair care product at issue was open and obvious. The Court of Appeals utilized the appropriate standard in reaching its decision, which was fully supported by case law.

B. The Hair Care Product at Issue Was Not a "Simple Product" Under Michigan Law.

Under Michigan law, a manufacturer and seller "of a simple product has no duty to warn of the product's potentially dangerous condition or characteristics that are readily apparent or visible upon casual inspection and reasonably expected to be recognized by the average user of ordinary intelligence." **Glittenberg v Doughboy Recreational Industries, 441 Mich 379, 385; 491 NW2d 208 (1992).** A simple product is "a product all of whose essential characteristics are fully apparent." **Id.**

In **Glittenberg,** the seminal case on the simple product doctrine, the Michigan Supreme Court found that the manufacturer of an above ground swimming pool owed no duty to warn as dangers posed by a shallow pool were obvious. In **Glittenberg,** the Plaintiffs suffered head injuries and paralysis as a result of diving head first into shallow water. **Glittenberg, supra at 385**. The

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[1] The product label identifies the following ingredients: Gin Gro Oil complex (Paraffin Oil, Tea Tree Oil, Kuki Nut Oil, Evening Primrose Oil, Avocado Oil, Coconut Oil, Wheat Germ Oil, Isoproply Myristate, Fragrance, Gin Gro Herbal Complex (Mi-Tieh-Hsng (Rosemary), Shu-Wei-Tsao (Sage), Bai-Zhi (Angelica Root), Gan-Cao (Licorice Root), I-Ye-Jen (Job's Tears), Cedar, Hyacincth, Clove, Lemon Balm, Chamomile, Carrot Oleo Resin, Azulene, Tocopheryl Acetate (Vitamin E), Retinyl Palmitate (Vitamin A), Cholecalciferol (Vitamin D). **(Appendix p. 12b)**.

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Court's decision was based on its finding that "above ground pools are simple products. No one can mistake them for other than what they are (ie. large containers of water that sit on the ground), all characteristics and features of which are readily apparent or easily discernable upon casual inspection." **Id. at 399.** Because the danger, the shallow water, was readily observable on casual inspection and the risk of hitting the bottom obviously encompasses the risk of catastrophic injury, the manufacturer had no duty to warn. **Id. at 400**.

The Court of Appeals in the case at bar properly found that the hair care product at issue was not a simple product. The only information the average product user has as to the content of the hair care product is the information provided to the consumer on the packaging label. The label on the product at issue in this case identified the contents as being "all natural." **(Appendix p. 12 b)**. In deed, the labeling listed various natural oils from edible fruits and vegetables including coconut, avocado, and wheat germ. **(Appendix p. 12b)**. Nothing on the labeling of this product identified the presence of hydrocarbons or any item which is widely recognized as being potentially toxic or lethal. **(Appendix p 12b)**. Thus, unlike in **Glittenberg,** the characteristics of the product were not fully apparent and were not visible or apparent upon casual inspection.[2] As such, the hair care product at issue was not a simple product.

C. The Mother of Plaintiff's Decedent Was Not a Sophisticated User of The Product At Issue

[2] Mrs. Green testified that she routinely read product Labels because she had small children and based on her review of the product label in the case at bar, she had no knowledge that this product could be toxic or fatal. **(Appendix pp. 14b, ¶¶ 3,6).**

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This Honorable Court in its Order granting Defendant-Appellant's Application for Leave to Appeal directed the parties to address the issue of 'whether plaintiff was a sophisticated user." The term sophisticated user is defined by statute as:

> [A] person or entity that, by virtue of training, experience, a profession, or legal obligations, is or is generally expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect. An employee who does not have actual knowledge of the product's potential hazard or adverse effect that caused the injury is not a sophisticated user. **MCL 600.2945(j); MSA 27A.2945(j).**

In the case at bar, the Court of Appeals properly held that there was no evidence presented that suggested Plaintiff was a sophisticated user. **Green**, **supra at 404, n 7**. The record was devoid of any such evidence for two reasons: First, the Defendants never raised the issue that Plaintiff was a sophisticated user. Second, Plaintiff was not a sophisticated user. No evidence in the record suggests that Plaintiff should generally be expected to have knowledge about Wonder 8 Oil's properties, including a potential hazard or adverse effect. If a consumer can be deemed a sophicated user merely by propr use of similar products. Everyone would qualify as a sophisticated user.

Plaintiff Cheryce Green was a high school graduate who went on to become a certified nursing assistant who regularly worked in a nursing home. **(Appendix, p. 18b-19b)** She was not a chemist. She was not employed or in anyway involved in the development or manufacturing of hair care products. She did not work at a poison control center. Plaintiff, Cheryce Green's only understanding of the content/properties of the product came from the label, which listed the "recipe" for the "all natural" product. **(Appendix p. 12b)** There is nothing in her background, education, or experience that would suggest that she would or should generally be expected to be knowledgeable about a product's properties, including a potential hazard or adverse effect.

D. Ingestion of the Product Was a Forseeable Misuse of the Product.

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Defendant claims that it is entitled to summary disposition because the claimed harm to Plaintiff's decedent was caused by misuse of the product that was not reasonably foreseeable. Pursuant to **MCL 600.2947; MSA 27A.2947** a manufacturer remains liable for misuse of the product if the misuse is reasonably foreseeable. Defendants claim that the 11 month old Plaintiff's decedent's ingestion of the subject product can only reasonably be considered to be an unforeseen product misuse. This argument fails on two levels:

First, Keimer Easley was 11 months old at the time of this incident. Therefore, comparative negligence may not be assessed against him. His "misuse" of the product cannot be attributable to him.

The issue then becomes whether or not it is reasonably foreseeable that a liquid substance, bearing absolutely no warnings regarding its dangers, toxicity and potential lethalness may be left out in a home where anyone, including a child, could have access to the product and ingest it. It is reasonably foreseeable, given the products purpose that it would be left out where children may have access to it as it is labeled and marketed as a hair and body oil.

Second, even the Defendants' agent, Terrance Nolan testified that unscrewing the cap of the subject product and using it by pouring it on to the hands is foreseeable. The product is a hair and skin moisturizer. (**Appendix p. 16b**). Although the product is designed to be applied through a pump, you can take the cap off and pour the product out. (**Appendix pp. 16b-17b**). He further admitted that the label of the product does not contain any statements or warnings that the product was harmful if swallowed or fatal if swallowed. He also agreed that there was no labeling or warning on this product that says to **"keep out of the reach of children". (Appendix pp 17b)**.

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It is axiomatic that a product that is liquid and that is marketed as a hair and body moisturizer could be used without the spray cap. This is especially true in circumstances where the spray pump malfunctions if the fluid level goes down to such a degree that the spray pump does not work effectively. Further, given its labeling, the contents listed in the "recipe", its color and consistency, it is reasonably foreseeable that the end user may leave this product out in the open in their home, specifically their bedroom or bathroom for use. Thus, having the product out in a location where a child may have access to it was reasonably foreseeable to the Defendants. Given its lethal propensities if ingested, the Defendant breached its duty by failing to provide appropriate warnings to alert the end user to the product's hazards.

Plaintiff Counsel has three comparison products, two of which are oils for body and scalp and the third is a body splash for moisturizing. All three of the products carry with it a very simple warning: "**Keep out of the reach of children**." In fact, the Bath and Body Works manufactured product entitled Sea Spray Body Splash with Moisturizing Aloe Vera, which is manufactured in a similar container, with a similar consistency and color to the subject product contains the following cautions on its label:

> **"Caution: for adult use only. Do not ingest. Keep out of the reach of children. . . . "**

It is significant that this product, contained in the same type of bottle, with the same application dispenser has warnings. which according to Cheryce Green's Affidavit would have caused her to lock up the product. (**Appendix p 14b**). It is significant because the Sea Spray product does not have any "oils" in it. Specifically it does not have paraffin oil/mineral oil, which is a

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hydrocarbon, which is contained in the subject product and was the cause of Plaintiff decedent's death.

E. Plaintiff Present Sufficient Evidence to Establish a Question of Fact as to Whether There was a Breach of Implied Warranty

Contrary to Defendant, Super 7's argument, Plaintiff has established breach of implied warranty with respect to the Defendants. Pursuant to **MCL 600.2947(6); MSA 27A.2947(6),** a seller has statutory defined liability. That liability has been defined as follows:

> **600.2947 (6)** In a product liability action, a seller other than a manufacturer is not liable for harm allegedly caused by the product unless either of the following is true:
>
> **(a)** The seller failed to exercise reasonable care, including breach of any implied warranty, with respect to the product and that failure was a proximate cause of the person's injuries.
>
> **(b)** The seller made an express warranty as to the product, the product failed to conform to the warranty, and the failure to conform to the warranty was a proximate cause of the person's harm"

MCL 440.2314; MSA 19.2314 sets forth the definition and parameters of an implied warranty, under which a seller is liable pursuant to **MCL 600.2947(6)(a); MSA 27A.2947(6)(a)**. **MCL 440.2314**; **MSA 19.2314** states:

> ". . . (1) A warranty that the goods shall be merchantable is implied in a contract for the sale if the seller is a merchant with respect to goods of that kind. . . . (2) Goods to be merchantable must be at least such as . . . (e) are adequately contained, packaged and labeled as the agreement may require."

In this case, it is undisputed that the subject product had no warnings whatsoever regarding its toxicity and potential lethal consequences. The only warnings contained on the label of the product are: "**Hair is flammable. Never spray near spark or open flame**."

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It is also undisputed that the Defendant, Super 7 Beauty Supply, Inc. is a merchant with respect to goods of the kind like the subject product. Plaintiff was simply a lay customer that went into a beauty supply store and bought the subject product because: (1) a sign posted by the Defendant store called her attention to the product and (2) the representations of the product being "natural" caused her to decide to buy the subject product.

Defendants reliance upon **Jodway v Kennametal, Inc., 207 Mich App 662; 525 NW2d 518 (1995)** is unfounded. **Jodway, supra**, established the principle that when a "skilled purchaser" knows or reasonably should be expected to know of the dangerous propensities or characteristic of a product that no implied warrant of merchantability arises. As discussed above, Plaintiff, Cheryce Green was not a "skilled' or sophisticated user.

RELIEF SOUGHT

Plaintiff-Appellee, Cheryce Green, as Personal Representative of the Estate of Keimer Easley, Deceased, respectfully requests that this Honorable Court Affirm the Court of Appeals' decision reversing the Trial Court's Order granting Defendant's Motion for Summary Disposition and reinstate Plaintiff's claim.

Respectfully Submitted,

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Dated: **January 24, 2006**

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